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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 598

ROBERT STUEBER AND JAMES M. STUEBER,

Petitioners,

vs.

ADMIRAL CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices:

Robert Stueber and James M. Stueber, petitioners, pray for the issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit, entered October 19, 1950 (R. 688). Petition for rehearing, duly filed by petitioners, was denied by the Court of Appeals on December 12, 1950 (R. 703).

Opinions Below

The Trial Court did not prepare or publish an opinion. The opinion of the Court of Appeals is reported, *Stueber et al v. Admiral Corporation*, 185 F. 2d 10 (R. 682).

Jurisdiction

This Court has jurisdiction under Section 28, United States Code, 1254 (1).

Constitutional Provision, and Federal Rule, Involved

Amendment VII, United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 50(b):

> Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. * * *

Statement of the Case

In July 1947, petitioners sued the respondent corporation in the Circuit Court of Cook County, Illinois, for malicious prosecution, and also for false arrest and imprisonment, the causes being thereafter removed to the United States District Court for the Northern District of Illinois, and consolidated (R. 2-5, 13-15). At the first trial, the Court

directed a finding of not guilty on the charge of false arrest and imprisonment. The jury returned verdicts for petitioners in the total amount of $32,500 on the remaining charge of malicious prosecution, and judgments were entered on the verdicts. On appeal, the Court of Appeals for the Seventh Circuit reversed and remanded for new trial, on the ground of the trial Court's failure to exclude prejudicial evidence. (*Stueber et al* v. *Admiral Corporation*, 171 F. 2d 777). This Court denied certiorari. (336 U. S. 961).

In its opinion, the Court of Appeals upheld the action of the Trial Court in overruling motions for directed verdicts, stating that "Where there is evidence both pro and con, obviously the question becomes one of fact, which must be submitted to the jury * * *. Whether all the facts and circumstances in evidence prove presence or lack of probable cause, we think was for the jury. The Court properly denied the motion for directed verdict." (*Stueber et al v. Admiral Corporation*, 171 F. 2d 777, 779).

On retrial, the charge of malicious prosecution alone remained. At the close of petitioners' case, and again at the close of all the evidence, respondent moved for a directed verdict, which on both occasions was denied. In overruling the motion at the close of all the evidence, the following occurred:

> "By Mr. Kennedy: This is a motion for a directed verdict, and I state the grounds therefor. The grounds for my motion are the same as on the motion I filed for a directed verdict at the close of the plaintiff's case, namely that the record, as it now stands, does not show want of probable cause * * *
>
> "By the Court: I then thought [meaning at the close of petitioners' case] that the questions were for the jury, and I still think so. Your motion will be denied." (R. 309)

The jury returned verdicts for the petitioners for a total of $55,000, and judgments were entered on the same (R. 600, 601).

The evidence on retrial substantially paralleled that on the original trial, except that none of the evidence held by the Court of Appeals to have been prejudicial, was introduced. The evidence established that Robert Stueber, one of the petitioners, was a franchise dealer of the respondent corporation (R. 94, 362), and for twelve years had been engaged in the business of selling and repairing electrical appliances, and radio and television sets (R. 91).

Also, he was a partner with co-petitioner James M. Stueber, his brother, in a wholesale radio parts and supply business in Chicago (R. 91). The petitioners enjoyed good reputations, and neither had ever been arrested nor charged with any crime (R. 92, 134, 217, 219-220).

Among petitioners' customers in the Chicago metropolitan area was a business establishment called West Town Sound, owned by Miles and Jerry Svoboda (R. 135). Petitioner James M. Stueber had had business dealings with such establishment in the past (R. 135), and on May 15, 1946, purchased from it a quantity of phonograph needles, paying by check to its order (R. 392). On June 8 and July 2, 1946, James Stueber also purchased job lots of phonograph needles and speakers from such business establishment, all purchases being made in the regular course of business (R. 138), so shown in the petitioners' books of account and check stubs, which identified the source of the purchases, and amounts paid (R. 138, 139, 384-390, 494, 496). All of the merchandise so purchased was placed by petitioners in their regular stock room on their premises (R. 141). The price paid by James Stueber for each needle was 50 cents, and the current wholesale market price at the time varied between 50 and 60 cents each, depending upon

the quantity purchased (R. 147). Respondent itself purchased similar needles for 39 cents each (R. 295), and such needles were commonly sold throughout Chicago (R. 100). The speakers were of a type commonly used in the radio industry, some with and some without transformers, bore no identifying marks, and were purchased at prices of from 75¢ to $1.00 each (R. 147, 138, 99). Such prices were approximately the same as those paid by these petitioners to another concern, at about this time, for similar speakers (R. 138). Such purchases by petitioners were made in job lots (R. 99, 138, 170).

Petitioners had no knowledge or reason to believe that the merchandise purchased by them was anything other than legitimate merchandise (R. 139). Petitioner Robert Stueber himself made no purchases or sales (R. 97, 98, 139).

On information that petitioners were selling phonograph needles, similar to those reported by respondent as having been taken in an alleged burglarizing at its warehouse on May 1, 1946, of 2066 kits of 12 needles each 3125 radio speakers, and other materials (R. 360), the police arrested petitioners at their place of business on September 21, 1946 (R. 259, 263). The police took 109 cards of needles and nine speakers from petitioners' stock room, to the Detective Bureau (R. 272), where petitioners furnished invoices showing that such merchandise had been bought in the ordinary course of business, and sold to their customers in and out of Chicago, original invoices having been made of such sales, and copies kept for their permanent records (R. 265, 266, 394-488).

At the Detective Bureau, the police informed respondent's office manager that they had four men under arrest, all businessmen, two of whom operated West Town Sound, and two of whom (petitioners) operated a radio store

(R. 293), and they showed him checks covering petitioners' purchases of merchandise, and invoices covering their sales (R. 260). This manager had access to the records of respondent's distributing branch, where the franchise to petitioners was on file (R. 53), but he did not consult such records, nor did he conduct any investigation of the petitioners or of the manner in which they had acquired the merchandise shown to him (R. 67, 684). He could not say that the needle cards which he saw at the Detective Bureau had been stolen (R. 85, 86), and the testimony respecting any identification of the speakers at the Detective Bureau is in conflict, the office manager having testified that such merchandise bore an identifying mark (R. 75), while petitioner's testimony was that there were no identifying marks (R. 99). The office manager also testified that all the nine speakers had transformers (R. 84), while the police officer and petitioners testified that only four had transformers (R. 272).

Notwithstanding such wholly inadequate identification, and notwithstanding the fact that the office manager was told by the police that the petitioners, who were businessmen in the radio supply business, purchased this merchandise from other businessmen, the purchases being made by check, and the sales, on invoices, copies of which were shown to him, and notwithstanding the fact that several examining magistrates were then sitting in the same building, before whom he could have presented any evidence on probable cause for issuance of a warrant (R. 274), nevertheless, without making inquiry or investigation, or appearing before such magistrate, the office manager signed criminal complaints in blank, charging petitioners with the crime of receiving stolen property (R. 261), and they were then held in custody until released on bond (R. 144).

Thereafter the office manager appeared and prosecuted these complaints against petitioners (R. 69). On hearing, petitioners were discharged by the Examining Magistrate in the Municipal Court of Chicago, and exonerated (R. 492, 493).

Questions Presented

1. Where, on an appeal, after judgments rendered for plaintiffs (petitioners) in action to a jury for malicious prosecution, the Court of Appeals, in reversing and remanding for new trial for failure to exclude prejudicial evidence, ruled that the issue of probable cause was for the jury on "all the facts and circumstances in evidence"; and where on another appeal, again after judgments rendered for petitioners on re-trial, the Court of Appeals reversed and remanded, with direction to enter judgments for defendant (respondent), holding that from "certain uncontradicted evidence" probable cause existed as a matter of law, has the Court of Appeals substituted its judgment for that of the jury, and thereby deprived petitioners of right of trial by jury, contrary to Amendment VII of the Constitution?

2. In holding in an action to a jury for malicious prosecution that probable cause is a question of law determinable from only a portion, and not all, of the evidence, has the Court of Appeals decided an important question of local law in a manner conflicting with applicable local decisions, and decision of this Court?

3. Does the provision of Federal Rule of Civil Procedure 50(b), for reservation of decision by the trial court on a motion for a directed verdict, operate conclusively and unequivocally, where the trial court has expressly declined so to reserve? If Rule 50(b) is construed to operate conclusively and unequivocally, then does it violate Amendment VII of the Constitution guaranteeing the right of trial by jury?

Reasons Relied upon for Allowance of the Writ

(a)

There is involved here the fundamental question of abridgment of right of trial by jury, as guaranteed under Amendment VII to the Constitution. In the trial, and again in the re-trial, in the cause at bar, the trial judge denied defendant's (respondent's) motions for directed verdict, made at the close of plaintiff's (petitioners') case, and again at the close of all the evidence, and the juries rendered verdicts for the petitioners, which the judge allowed to stand. However, the Court of Appeals reversed both judgments, the first because of failure of exclusion of prejudicial evidence, and the second on the ground that from "certain uncontradicted evidence", which the Court singled out, probable cause existed as a matter of law, although in its preceding reversal and remanding for new trial, the Court had ruled that the issue of probable cause was for the jury on "all the facts and circumstances in evidence".

(b)

" 'Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials'.

"The call for the true application of the Seventh Amendment is not to words, but to the honest desire to see that Constitutional right preserved. * * * Since this is a matter of high Constitutional importance, appellate courts should be alert to insure the preservation of this Constitutional right. * * *" (Mr. Justice Black, in dissenting opinion, *Galloway* v. *United States*, 319 U. S. 372, 407)

(c)

In connection with the preservation of this Constitutional right, the construction, and extent of operation of the quoted

provision of Federal Rule of Civil Procedure 50(b) are of recognized particular importance, and this Court should rule upon such questions, and upon the constitutionality of the provision. United States Supreme Court Reports, 85 Law Ed. 155, 161-162 (Constitutionality of Rule 50(b), 164-165) (subhead d.)

Point I

WHERE, ON A FIRST APPEAL, AFTER JUDGMENTS RENDERED FOR PLAINTIFFS (PETITIONERS) IN ACTION TO A JURY FOR MALICIOUS PROSECUTION, THE COURT OF APPEALS, IN REVERSING AND REMANDING FOR NEW TRIAL BECAUSE OF FAILURE TO EXCLUDE PREJUDICIAL EVIDENCE, RULED THAT THE ISSUE OF PROBABLE CAUSE WAS FOR THE JURY ON "ALL THE FACTS AND CIRCUMSTANCES IN EVIDENCE"; AND WHERE ON ANOTHER APPEAL, AGAIN AFTER JUDGMENTS RENDERED FOR PETITIONERS ON RE-TRIAL, THE COURT OF APPEALS REVERSED AND REMANDED, WITH DIRECTION TO ENTER JUDGMENT FOR DEFENDANT (RESPONDENT), HOLDING THAT FROM "CERTAIN UNCONTRADICTED EVIDENCE" PROBABLE CAUSE EXISTED AS A MATTER OF LAW, THE COURT OF APPEALS HAS IN EFFECT SUBSTITUTED ITS JUDGMENT FOR THAT OF THE JURY, AND DEPRIVED PETITIONERS OF RIGHT OF TRIAL BY JURY, CONTRARY TO AMENDMENT VII OF THE CONSTITUTION.

On the first trial, the jury returned verdicts for the plaintiffs (petitioners), totalling $32,500, the trial judge having overruled motions for directed verdict for the defendant (respondent) made at the close of petitioners' case, and again at the close of all the evidence. In reversing and remanding for a new trial, for failure to exclude prejudicial evidence, the Court of Appeals for the Seventh Circuit, speaking through Judge Lindley, nevertheless approved the action of the trial court in overruling the motions for directed verdict, and in submitting the question of probable cause to the jury, saying:

> "Where there is evidence both pro and con, obviously the question becomes one of fact which must be sub-

> mitted to the jury. * * * Whether all the facts and circumstances in evidence proved presence or lack of probable cause, we think, was for the jury. The Court properly denied the motion for a directed verdict." (*Stueber et al* v. *Admiral Corporation*, 171 F. 2d, 777, 779)

On re-trial, the mandate of the Court of Appeals was carefully followed. All of the evidence at the first trial was reintroduced, except that which the Court of Appeals had held to be prejudicial. Motions by respondent for directed verdict were again made at the close of petitioners' case, and at the close of all the evidence, and were denied, the Court stating:

> "I then thought [meaning when respondent moved for directed verdict at close of petitioners' case] that the questions were for the jury, and I still think so. Your motion will be denied." (R. 309)

The jury again returned verdicts for petitioners in the total of $55,000.00, and judgments were entered on the same. (R. 601)

On the second appeal, the Court of Appeals held that from "certain uncontradicted evidence" (which it had singled out), probable cause existed as a matter of law (R. 686), and it reversed and remanded, with direction to enter judgment for respondent, notwithstanding the fact that the evidence on the re-trial paralleled that at the first trial, with the exception above noted, and notwithstanding the fact that in reversing and remanding for new trial, after the first trial, the Court of Appeals, again through Judge Lindley, had held that the question of probable cause was a jury question on "all of the facts and circumstances in evidence", and upon the "evidence both pro and con". (*Stueber et al* v. *Admiral Corporation*, 171 F. 2d, 777, 779)

The so-called uncontradicted evidence singled out by the Court of Appeals had serious conflicts within itself (R. 684), which the jury by its verdict had already resolved.

The Court of Appeals had passed upon the instructions to the jury in the first trial, on the issue of probable cause, and had approved them. (*Stueber et al* v. *Admiral Corporation,* 171 F. 2d, 777, 780) Accordingly, after re-trial, and second verdicts for the petitioners, that Court should not have substituted its judgment for that of the jury, by considering only "certain uncontradicted evidence", conflicting within itself, and not considering "all the facts and circumstances in evidence", and then remanding with directions to enter judgment for respondent. By so doing, that Court deprived petitioners of right to jury trial, contrary to Amendment VII of the Constitution. *Tennant* v. *Peoria & Pekin Union R. Co.,* 321 U. S. 29.

The situation at bar is similar to that in *United States* v. *Clark,* 98 U. S. 37, 40, in which the Court of Claims was reversed for the reason that in its very opinion, in support of its judgment, was evidence that in law such judgment was wrong. Here, the Court of Appeals in support of its judgment of reversal in a jury case has selected only certain of the evidence, conflicting within itself, and not all of the evidence, and accordingly has rendered a judgment which also on its face is wrong as a matter of law.

Point II

IN HOLDING IN AN ACTION TO A JURY FOR MALICIOUS PROSECUTION THAT PROBABLE CAUSE IS A QUESTION OF LAW DETERMINABLE FROM ONLY PORTIONS, AND NOT ALL, OF THE EVIDENCE, THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A MANNER CONFLICTING WITH APPLICABLE LOCAL DECISIONS, AND WITH DECISIONS OF THIS COURT.

The action of the Court of Appeals in singling out certain evidence, and in not considering all the evidence, and

then determining that probable cause existed as a matter of law, is contrary to the decision of the Supreme Court of Illinois, in *Hirsch* v. *Feeney*, 83 Ill. 548, and also contrary to the decision of this Court in *Stewart* v. *Sonneborn*, 98 U. S. 197.

In the Hirsch case, the Supreme Court of Illinois said: (549)

> ". . . The Court had no power to take the question of probable cause or of malice from the consideration of the jury.
>
> "The first of these refused instructions recites certain portions of the evidence, and says, if the jury believed it to be true, that they established probable cause, and they should find for the defendant. Concede these facts to be true, the court cannot say, as a matter of law, that they constitute probable cause. There were other facts in the case that were important in their bearing on the question, not enumerated. The whole of the evidence with the attending circumstances, should be considered in determining whether there was probable cause."

In the *Sonneborn* case, this Court held that whether the circumstances alleged to show probable cause, are true, and existed, is a matter of fact, and that it is the duty of the court, when evidence has been introduced to prove or disprove the existence of probable cause, to submit the question to the jury with proper instructions. In the case at bar, the question of probable cause was submitted to the jury under instructions previously approved by the Court of Appeals.

By singling out only certain evidence, and then holding that the question of probable cause was one of law and not of fact, the Court of Appeals has decided an important question of local law in conflict with applicable local decisions, and in conflict with a decision of this Court on an important question of general law, namely, whether the existence of

probable cause in a jury action for malicious prosecution is a question for the jury on all of the evidence, or whether it is a question of law based only upon certain evidence. The effect of the decision of the Court of Appeals is virtually to eliminate a trial by jury for malicious prosecution, by permitting the Appellate Court to supplant the jury as the trier of the facts, and of the issues of credibility, two juries having already passed on the issues of credibility and of fact. *Myers* v. *Reading Co.*, 331 U. S. 477, 485.

Point III

RULE 50(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS NOT TO BE CONSTRUED AS PROVIDING A CONCLUSIVE AND UNEQUIVOCAL RESERVATION OF DECISION ON A MOTION FOR A DIRECTED VERDICT, WHERE THE TRIAL COURT HAS EXPRESSLY DECLINED SO TO RESERVE. IF RULE 50(b) IS CONSTRUED TO OPERATE CONCLUSIVELY AND UNEQUIVOCALLY, THEN IT VIOLATES AMENDMENT VII OF THE CONSTITUTION, GUARANTEEING THE RIGHT OF TRIAL BY JURY.

The trial judge overruled motions for directed verdict made by respondent at the close of petitioners' case, and again at close of all the evidence, expressly stating that he considered that the questions were for the jury (R. 309). *He thereby made it very clear that he did not choose to reserve his decision on the motion for directed verdict.* Nevertheless, the Court of Appeals has directed the trial court to enter judgments for the respondent, acting under the provisions of Federal Rule 50(b), "that whenever a motion for a directed verdict made at the close of all the evidence is denied, or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal issues raised by the motion". Inasmuch as the trial court disavowed any reservation upon the motion for directed verdict, expressly stating, when he denied it, that the questions presented

by it were for the jury, the Court of Appeals has proceeded upon the construction that the reservation under Rule 50(b) operates conclusively and unequivocally. If such construction is correct, then this provision of Rule 50(b) is violative of Amendment VII of the Constitution. In a trial by jury in a Federal Court, the Judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. The discharge of the judicial function as at common law is an essential factor in the process provided by the Constitution. *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95.

In *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, the Court of Appeals had reversed the judgment entered on the verdict of the jury, and in accordance with State practice, directed entry of judgment for defendant, notwithstanding the verdict. This Court held (399) that this "could not be done consistently with the 7th Amendment, which not only preserves the common-law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall be re-examined otherwise than 'according to the rules of the common law'. To the suggestion that in so holding we are but adhering to a mere rule of procedure at common law there is a two-fold answer: First, the terms of the Amendment and the circumstances of its adoption unmistakably show that one of its purposes was to require adherence to that rule, which in long years of practice had come to be regarded as essential to the full realization of the right of trial by jury; and, second, the right to a new trial in a case such as this, on the vacation of a favorable verdict secured from a jury, is a matter of substance and not of mere form, for it gives opportunity, as before indicated, to present evidence which may not have been available or known before, and also to expose any error or untruth in the opposing evidence."

This Court accordingly modified the judgment of the Court of Appeals by eliminating the direction to enter judgment for the defendant, notwithstanding the verdict, and substituting direction for a new trial. See also *Young* v. *Central R. Co.*, 232 U. S. 602.

In *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 655, a reservation of decision on motion for directed verdict was expressly made by the trial court, before the case went to the jury, and the verdict was taken subject to that reservation. The trial court permitted the verdict to stand. The Court of Appeals reversed the judgment, and remanded for new trial. The defendant had requested a remanding, with direction to dismiss, but the Court of Appeals declined to do so, on the authority of the *Slocum* case. In reviewing the action of the Court of Appeals, this Court affirmed its ruling in the *Slocum* case, but distinguished it from the *Redman* case, pointing out that reservation on motion for directed verdict had been expressly made in the *Redman* case.

In *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389, 394, this Court, again affirming its ruling in the *Slocum* case, held that where, before submission of a case to the jury, a trial court denies a motion for a directed verdict without reserving any question of law, neither that court nor the appellate court has jurisdiction, after the rendition of a verdict against the party making the motion, to find or adjudge in favor of such party notwithstanding the verdict.

Unless Federal Rule 50(b) is held to operate conclusively and unequivocally to effect the reservation in question, the case at bar falls within the ruling in the *Slocum* case, the trial judge having declined to make reservation of ruling on the motion by respondent for a directed verdict. If however

it is held that under construction of Rule 50(b), such reservation does operate conclusively, even though the trial judge has not chosen to reserve his decision on the motion for directed verdict, then Rule 50(b) is violative of Amendment VII, guaranteeing the preservation of right of trial by jury. *Slocum* v. *New York Life Insurance Co., supra; Herron* v. *Southern Pacific Co., supra.*

Conclusion

Wherefore it is respectfully submitted that this petition for allowance of a writ of certiorari should be granted, and the judgment of the Court of Appeals reversed, with direction to affirm the judgments of the District Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 598

ROBERT STUEBER AND JAMES M. STUEBER,
Petitioners,

vs.

ADMIRAL CORPORATION,
Respondent.

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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April 9, 1951.

THE CHURCHILL-BLANKE PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 598.

ROBERT STUEBER AND JAMES M. STUEBER,
Petitioners,

vs.

ADMIRAL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion of Court of Appeals.

On October 19, 1950, the Court of Appeals reversed judgments in favor of petitioners* and remanded the consolidated cause to the United States District Court for the Northern District of Illinois, Eastern Division, with directions to enter judgments for the defendant (R. 688). Petition for rehearing was denied on December 12, 1950 (R. 703).

The opinion of the Court of Appeals is reported, *Stueber, et al.* v. *Admiral Corporation*, at 185 F. 2d 10. Its full text also appears in the record, at pages 682-687, inclusive.

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* Plaintiffs-petitioners are hereinafter referred to as "plaintiffs," and respondent as "defendant."

STATEMENT OF THE CASE.

In this case, involving charges of malicious prosecution, the Court of Appeals reversed judgments for plaintiffs, entered in the trial court on jury verdicts, and remanded the cause with directions to the trial court to enter judgments for the defendant. This decision was based not only on the proposition that plaintiffs had failed to show that the prosecution was instituted without probable cause, but also on the proposition that undisputed evidence showed "there was, as a matter of law, probable cause for the defendant's prosecution of the plaintiffs, * * *." Accordingly, said the Court, "the trial court should not have submitted this question to the jury, but should have granted defendant's motions for directed verdicts" (R. 687).

Defendant's motions for directed verdicts were made at the close of plaintiffs' case and at the close of all the evidence and were overruled by the trial court (R. 26, 240, 247; R. 309, 590).

The facts, as disclosed by the record presented in the case at bar, are adequately stated in the opinion of the Court of Appeals. The basis for the Court's conclusions and decision is therein made amply clear (R. 682-687). At the same time, the Court's statements make it clear that plaintiffs' assertions as to "facts" are incomplete as well as inaccurate (Petition for Certiorari, pp. 4-7).

Fully apparent, too, from the Court's opinion are the differences between the evidence in an earlier trial, which had been considered in an earlier appeal, and the evidence before the Court in the case at bar (R. 685-686). These differences in evidence presented by the two records led to different conclusions on the part of the Court with respect to the propriety of submission of the case to the jury.

QUESTIONS PRESENTED.

The questions, which plaintiffs assert are presented, involve right of trial by jury (U. S. Constitution, Amendment VII) allegedly violated through the application of Rule 50 (b) of the Federal Rules for District Courts, or in some other manner; and an alleged conflict between this and other decisions of the Court of Appeals for the Seventh Circuit or of the Supreme Court.

ARGUMENT.

I.

THERE IS NO MERIT TO PLAINTIFFS' CONTENTION THAT THEY WERE DEPRIVED OF THEIR RIGHT TO TRIAL BY JURY. THE COURT OF APPEALS' CONCLUSION THAT PLAINTIFFS FAILED IN THEIR PROOF AND THAT PROBABLE CAUSE EXISTED AS A MATTER OF LAW WAS NOT REACHED IN THE LIGHT OF "ONLY PORTIONS, AND NOT ALL, OF THE EVIDENCE."

Under their heading "Statement of the Case," plaintiffs attempt to lay the groundwork for this contention and for their later argument (Petition for Certiorari, pp. 2-4, 9-13).

Boiled down, they say this: Having held that, on the evidence in the earlier trial, the question of probable cause was for the jury, the Court of Appeals was prevented, on the basis of the evidence presented to it following the second trial, from reaching any different conclusion with respect to the trial court's ruling on motions for directed verdicts (Petition for Certiorari, pp. 9-11).

They base their contention upon the utterly incorrect statement (Petition for Certiorari, p. 4) that "the evidence on retrial *substantially paralleled* that on the original trial, except that none of the evidence held by the Court of Appeals to have been prejudicial, was introduced." (Italics supplied.)

This claim was fully argued by plaintiffs—under the doctrine of the "law of the case," which has been understandably abandoned here—both in their main brief filed in the Court of Appeals and in their petition for rehearing.

The Court of Appeals overruled their contention; and, in its opinion, the Court fully answered it. For conven-

ience this answering passage from the Court's opinion is, in part, restated here (R. 685-686):

> "That there are substantial differences in the evidence which was before this court on the prior appeal and that which was presented at the second trial is, it seems to us, abundantly clear. * * * it becomes evident that this is not a case for the application of the rule of law urged by plaintiffs and that the question of the propriety of the denial, by the trial court, of the defendant's motions for directed verdicts must be determined solely on the basis of the evidence appearing in the record made on the second trial, not by what this court said of substantially different evidence on the prior appeal."

The Court of Appeals likewise answered plaintiffs' contention, made under various headings in their Petition for Certiorari (pp. 9, 11-12), that the Court "singled out" and based its decision solely upon "certain uncontradicted evidence." That any such claim is groundless is apparent not only from the opinion as a whole but even from the single complete sentence from which plaintiffs lifted the clause upon which they rely (Opinion of Court, R. 686):

> "Here, however, we are of the opinion that, giving full credence to all of plaintiffs' evidence, it does not show that defendant instituted the prosecution of the plaintiffs without probable cause, for there is, in the record, certain uncontradicted evidence which establishes clearly that probable cause existed as a matter of law."

Nor do plaintiffs' cited cases furnish any support for their position (Petition for Certiorari, p. 11; *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29; *United States* v. *Clark*, 96 U. S. 37, 40). No analogy or relevance is remotely presented by either of them.

It is submitted that the Court of Appeals did not "sub-

stitute its judgment for that of the jury"; that no constitutional right of trial by jury was violated.

II.

CONTRARY TO PLAINTIFFS' CONTENTION, THE COURT OF APPEALS DID NOT DECIDE "AN IMPORTANT QUESTION OF LOCAL LAW IN A MANNER CONFLICTING WITH APPLICABLE LOCAL DECISIONS," OR "WITH DECISIONS OF THIS COURT."

Plaintiffs' cases, cited under their Point II (Petition for Certiorari, pp. 11-13), lend no support to this specious contention. *Hirsch* v. *Feeney*, 83 Ill. 548, which they cite, was a malicious prosecution suit involving a charge which had been made against plaintiff with no preliminary investigation made by anyone upon which defendant could place reliance. The Illinois Supreme Court held that, on the facts presented, the issue of probable cause was for the jury. And the language which plaintiffs quote from the Court's opinion (Petition for Certiorari, p. 12) relates only to the propriety of the trial court's refusal to give to the jury certain instructions relative to probable cause. *Hirsch* v. *Feeney* (83 Ill. 548) is no authority for plaintiffs' claim.

Stewart v. *Sonneborn*, 98 U. S. 187, 197, cited by plaintiffs, is likewise inapplicable. The facts presented there were wholly at variance with the case at bar.

So far as credibility of witnesses is concerned, brought up by plaintiffs' reference to *Myers* v. *Reading Co.*, 331 U. S. 477, 485 (Petition for Certiorari, p. 13), there was no occasion for such considerations here. Plaintiffs' evidence was given "full credence," and they still failed to make out a case; in fact, it established affirmatively the existence of probable cause.

There is no basis for plaintiffs' contention with respect to alleged conflicts in local or Supreme Court decisions.

III.

THE TRIAL JUDGE DID NOT AND COULD NOT BY REFUSING TO RESERVE RULING ON MOTIONS FOR DIRECTED VERDICT DEPRIVE COURTS OF REVIEW OF THE POWER TO CORRECT THE ERRONEOUS RULING.

Rule 50 (b) provides that whenever a motion for directed verdict at the close of all the evidence "is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

Nevertheless, plaintiffs, under Point III of their Petition for Certiorari (pp. 13-15), claim that the Rule is not effective in the instant case because the trial judge "did not choose to reserve his decision on the motion for directed verdict" and "disavowed any reservation." So, plaintiffs argue, the courts of review were deprived in the instant case of power to correct the ruling by which the trial court refused to direct a verdict, which ruling the reviewing court has held was erroneous. It was beyond the power of courts of review, plaintiffs say, to direct that the lower court dispose of the cause by entering the order which the reviewing court has here held should have been entered in the first instance.

Manifestly, it is beyond the power of a trial judge to avoid the effect or alter the applicability of the Rules with respect to any particular case and so control the extent to which his own rulings will be subject to review or correction.

Furthermore, the argument of plaintiffs completely ignores the portion of Rule 50(b) which provides:

> "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; * * *."

Defendant met all requirements of this rule. It moved for a directed verdict at the close of plaintiffs' evidence (R. 26, 240, 247), and at the close of all of the evidence (R. 309, 590), and filed a timely motion after verdict for judgment in accordance with its motions for a directed verdict (R. 602). Thus the adverse rulings on these motions by the trial court were preserved and presented for review and correction. *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212; *Globe Liquor Co., Inc.* v. *San Roman*, 332 U. S. 571.

Plaintiffs' claim as to the alleged invalidity of Rule 50 (b) is likewise without substance. *Brunet* v. *S. S. Kresge Co.* (C. A. 7), 115 F. 2d 713, *cert. den.* 313 U. S. 577, squarely answers plaintiffs' claims. There the question presented was whether appellee-plaintiff had been denied "the right of trial by jury" through the Court of Appeals' decision which was analogous to the one at bar. The Court of Appeals held that Rule 50 (b) had "done away with the distinction between cases as to whether or not there was an express reservation of ruling",—among which cases were those relied upon by plaintiffs here: *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, and *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, and likewise *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654 (Petition for Certiorari, pp. 14-16). See, also, *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212; *Globe Liquor Co., Inc.* v. *San Roman*, 332 U. S. 571.

The holding of the Court of Appeals that from undisputed facts it followed as a matter of law that plaintiffs had no right of action and its direction to the lower court to dismiss the action in conformity with that holding was a proper exercise of judicial power. It did not invade the province of the jury nor infringe constitutional right.

Conclusion.

There was ample justification, in the record in the case at bar, for the Court of Appeals' decision that the judgments of the trial court should be reversed and the cause remanded with directions to enter judgments for the defendant.

It is submitted that there is nothing in the case which warrants the allowance by this Court of a writ of certiorari, and that plaintiffs' petition should accordingly be denied.

Respectfully submitted,

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April 9, 1951.

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CHARLES ELMORE C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 598

ROBERT STUEBER AND JAMES M. STUEBER,
Petitioners,

vs.

ADMIRAL CORPORATION,
Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ROBERT STUEBER AND JAMES M. STUEBER,
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vs.

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REPLY BRIEF FOR PETITIONERS

Statement of the Case

At its page 2, under this heading, Respondent incorrectly infers that the decision of the Court of Appeals was based in part on the proposition that "undisputed evidence showed 'there was, as a matter of law, probable cause for defendant's prosecution of the plaintiffs' ". As disclosed in Petitioners' Petition, under Statement of the Case (Pet. 4-7), Questions Presented 1 and 2 (Pet. 7), and again under Point I (Pet. 10, 11), the decision of the Court of Appeals was based only on "certain uncontradicted evidence" which it had singled out, notwithstanding the fact that the Court of Appeals in its earlier ruling, following the first trial in this cause, had held that the question of probable cause was a jury question on "all of the facts and circumstances in evidence", and upon the "evidence

both pro and con." (*Stueber et al.* v. *Admiral Corporation*, 171 F. 2d 777, 779.) Moreover, such so-called uncontradicted evidence singled out by the Court of Appeals had serious conflicts within itself (R. 684), which the jury by its verdict had already resolved.

Respecting Respondent's unsupported statement under this heading that Petitioners' assertions as to facts are incomplete as well as inaccurate, it will be observed that Respondent does not endeavor to show wherein such facts are incomplete or inaccurate. Every statement of fact in the Petition is supported in each instance by one or more record references.

Questions Presented

Under this heading, at its page 3, Respondent gives incorrect statement of Petitioners' Questions Presented.

Petitioners do not present the question of a violation of the Seventh Amendment through a mere application of Federal Rule of Civil Procedure 50(b), their question in this regard with relation to that Rule being specifically as follows (Pet. 7):

> Does the provision of Federal Rule of Civil Procedure 50(b), for reservation of decision by the trial court on a motion for a directed verdict, operate conclusively and unequivocally, where the trial court has expressly declined so to reserve? If Rule 50(b) is construed to operate conclusively and unequivocally, then does it violate Amendment VII of the Constitution, guaranteeing the right of trial by jury?

In addition, Petitioners present the further questions:

> Where, on an appeal, after judgments rendered for plaintiffs (petitioners) in action to a jury for malicious prosecution, the Court of Appeals, in reversing and remanding for new trial for failure to exclude prejudicial evidence, ruled that the issue of probable cause

was for the jury on "all the facts and circumstances in evidence"; and where on another appeal, again after judgments rendered for petitioners on re-trial, the Court of Appeals reversed and remanded, with direction to enter judgments for defendant (respondent), holding that from "certain uncontradicted evidence" probable cause existed as a matter of law, has the Court of Appeals substituted its judgment for that of the jury, and thereby deprived petitioners of right of trial by jury, contrary to Amendment VII of the Constitution?

In holding in an action to a jury for malicious prosecution that probable cause is a question of law determinable from only a portion, and not all, of the evidence, has the Court of Appeals decided an important question of local law in a manner conflicting with applicable local decisions, and decision of this Court?

Argument

Point I

Contrary to Respondent's assertion under this heading, page 5, the authorities cited in the Petition as indicated do furnish support for Petitioners' position, and are relevant. In Petitioners' cited case of *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35, in which the Court of Appeals had reversed the judgment of the District Court for the Plaintiff, and had directed the entry of judgment for defendant notwithstanding the verdict, this Court held that by such action plaintiff had been deprived of right of trial by jury, stating:

> "It is the jury, not the Court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . .

That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. . . . Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

POINT II

Respondent's assertions do not meet Petitioners' contentions that the Court of Appeals has decided an important question of local law in a manner conflicting with applicable local decisions, and with decisions of this Court. *Hirsch* v. *Feeney*, 83 Ill. 548, is directly in point on the requirement that "The whole of the evidence with the attending circumstances, should be considered in determining whether there was probable cause", and also on the proposition that "the Court had no power to take the question of probable cause . . . from the consideration of the jury."

In the *Hirsch* case, as in the case at bar, the signing of criminal complaint was in reliance upon the advice from detectives. In holding that such reliance is not justification, the Court in the *Hirsch* case stated:

> "The law has never regarded the advice of detectives as being a justification for instituting mistaken criminal proceedings. It, on the contrary, is believed that such persons, from the very nature of their business, become more suspicious than ordinary persons."

Stewart v. *Sonneborn*, 98 U. S. 187, is in point on the questions of law presented.

The evidentiary basis for the jury verdicts in the cause at bar clearly appears in the facts set forth in Petitioners'

Statement of the Case (Pet. 4-7), such facts not being controverted by Respondent. As this Court held in *Myers* v. *Reading*, 331 U. S. 477, 485, the jury is free to discard and disbelieve whatever facts are inconsistent with its conclusions, and the function of the appellate court is exhausted when the evidentiary basis becomes apparent. The Courts of Appeals cannot, as was done in the case at bar, search the record and select certain evidence to support its decision reversing the judgment in the lower Court for the plaintiff, and directing entry of judgment for defendant, notwithstanding the verdict. To do so would permit the Courts of Appeals, contrary to the decisions of this Court, to supplant the jury as the trier of the facts, and of the issues of credibility.

Point III

In connection with the preservation of the constitutional right of trial by jury, the construction, and extent of operation, of the provision of Federal Rule of Civil Procedure 50(b) are of recognized particular importance, and the Court should rule upon such questions, and upon the constitutionality of the provision.

These questions are discussed in the annotations appearing 85 Law Ed. 155, 162-165, immediately after *Montgomery Ward & Co.* v. *Duncan*, 85 Law Ed. 147, the following pertinent queries being presented and discussed:

> "Whether a construction of Rule 50(b) that the reservation operates conclusively, even though the trial judge may not choose to reserve his decision on the motion for a directed verdict, constitutes an unconstitutional encroachment upon the liberty of the judge." 85 Law Ed. 162.
>
> "Whether the reservation operates conclusively in the face of an express statement to the contrary, and

whether, if so construed, it may be given effect under the Federal Constitution." 85 Law Ed. 165.

See also Ohlinger's Federal Practice, Vol. 3 A, pages 166-169.

Respondent concedes that the questions of construction, extent of operation, and constitutionality of the provision of the Rule, are before this Court, and it admits that the trial judge expressly refused to reserve ruling on the motions for directed verdicts. It contends, however, that its constitutionality was upheld by the decision of the United States Court of Appeals for the 7th Circuit, in *Brunet* v. *S. S. Kresge Co.*, 115 Fed. 2d 713. Such decision is patently inapplicable.

In that case the motion for directed verdict was taken under advisement, and later denied, the trial court thereby bringing itself clearly within the reservation provision of Rule 50(b). In the case at bar, however, the motions for directed verdict were not taken under advisement, and the Court disavowed any reservation upon the same, expressly stating when he denied such motions that the questions presented by them were for the jury (R. 309).

In *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 382, this Court said:

> "In the trial by jury, the right to which is secured by the 7th Amendment, both the court and the jury are essential factors. . . To dispense with either . . is to impinge on that right."

If Federal Rule 50(b) does operate conclusively to effect an automatic reservation of the legal questions when the trial judge has expressly declined so to reserve, then it

dispenses with the functions of the trial judge as an essential factor in a jury case, contrary to the 7th Amendment.

WHEREFORE, it is earnestly urged that this Petition for Certiorari should be granted.

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